Supreme Court, U.S.
FILED
AUG 7 1992
OFFICE OF THE CLERK

No. 92-85

In The

Supreme Court of the United States

October Term, 1992

MORRIS M. RAND,

Petitioner,

vs.

JAMES A. PROSTKO, TRUSTEE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Has petitioner raised an issue of federal law so special and important as to warrant review via certiorari jurisdiction?

2. Did the Bankruptcy Court and appellate courts below consider petitioner's arguments and correctly apply the doctrine of judicial estoppel to the facts presented?

LIST OF PARTIES

The respondent adopts the petitioner's list of parties with the following correction:

The appellee in the Court of Appeals was James A. Prostko, *Chapter 7 Trustee* for Pizazz Disco and Supperclub, Inc., the named respondent in this proceeding.

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This case involves the Bankruptcy Court's enforcement of its own order confirming the sale of the business and assets of Pizazz Disco and Supperclub, Inc. (the Debtor). The court below agreed with the Bankruptcy Judge that the Petitioner, Morris M. Rand, could not escape personal responsibility for the sale price under the unique circumstances presented.

A. The Events Leading to a Sale

The Debtor filed a voluntary petition under Chapter 11 of the

Bankruptcy Code on December 8, 1987. On the date of filing, the Debtor owned and operated a disco and supperclub under the name of Pizazz/Chauncys at the Coral Ridge Mall in the city of Fort Launderdale, Florida. The club was large, well appointed and filled a leased area of 25,000 square feet. The central reason for the bankruptcy filing involved a dispute between the Debtor and its landlord which threatened the continued operation of the business.

During the bankruptcy the Debtor attempted to lease or sell the night club business and assets. One of the interested purchasers was Petitioner, Morris M. Rand. In April 1988 the Debtor received an offer from Morris Rand to purchase the Debtor's assets. Based upon the pending offer, the Debtor filed a motion for sale of all assets of the Debtor and for an expedited hearing. Due to revision of the terms of the sale, amended motions were filed by the Debtor requesting court approval of the terms of the proposed agreement. The Debtor's amended motion for sale (Appendix 72) sets forth that petitioner, Morris Rand, has an unencumbered net worth in excess of $10,000,000 and that with Mr. Rand's financial backing, defendant, MRGB, Inc., an entity incorporated by Rand for the express purpose of operating the club, stood ready, willing and able to tender the cash portion of the purchase price and assume other obligations pursuant to the sale. These representations were confirmed to the court and counsel for other creditors by Robert Wunker, Esquire, counsel for Mr. Rand.

On May 19, 1988, the Bankruptcy Court scheduled hearings on several pending motions including the Debtor's motion for sale, the Debtor's motion for authority to enter into a management agreement and the landlord's motion for relief from automatic stay. At that lengthy hearing, several objections were raised to the sale by creditors. The parties and the court attempted to resolve the matters raised so that the sale could go forward. It was clear at this point that, petitioner, Morris Rand, was assigning his interest in the

original agreement of sale to defendant, MRGB, Inc. Several creditors raised objections to the sale of the Debtor's assets to a shell corporation. Mr. Wunker, who had entered his appearance on behalf of Mr. Rand only (Appendix 251), assured the court at that hearing that MRGB, Inc. was not going to be a shell corporation. (*See* admission of Mr. Wunker in transcript of May 19, 1988 hearing, p. 27, l. 11 at Appendix. 278.) Mr. Wunker led the court, the creditors and the Debtor's attorneys to believe that Mr. Rand would be providing the capital for this purchase and that he would fund or had funded the corporation in a sufficient amount. *See* testimony of Debtor's counsel, Ronald Conway and Michael Fives at Appendix 810-811, 837-844.)

After much further negotiation and two additional hearings, Judge Fitzgerald requested that the parties submit a proposed order of court setting forth the agreed-upon terms of the sale. The order was prepared and submitted to Judge Fitzgerald for signature. The court, on the record, thoroughly reviewed the language of the order and required a modification as to the rental credit to the purchaser set forth in Paragraph 8C of the order. The order was quickly amended to include the provision requested by the court. That afternoon, Judge Fitzgerald entered an order confirming the sale of the Debtor's assets to MRGB, Inc. for the sum of $1,250,000 (Appendix 222). The order was entered based upon the representations made in the amended motion and the representations of Mr. Rand's counsel relating to Mr. Rand's financial ability to conclude the sale.

B. The Appointment of a Trustee

On June 1, 1988, the day following the entry of the order confirming the sale, Mr. Wunker notified counsel for the interested parties that MRGB, Inc. was unwilling to close on the transaction because the court had modified the order confirming the sale as

originally proposed and would not permit a credit for the payment of the May 1988 rent which had been advanced by the buyer without court authority. The court, instead, provided in Paragraph 8C of the order that an administrative claim may be presented for this item.

Thereafter, absolutely *no* action was taken by the buyer to attempt to modify the order confirming the sale and *no* notice of appeal was filed. As shown by the testimony and evidence produced at trial, the Debtor was at all times, ready, willing and able to close on the sale. George Blacke was already on the premises operating the facility.

On June 16, 1988 at the hearing on the creditor's committee's cautionary motion to convert and to appoint a trustee, Judge Fitzgerald advised Mr. Wunker, counsel for Morris Rand, of the remedies available to the buyer. (*See* transcript of hearing conducted on June 16, 1988 at p. 9, ll. 9-25; p. 10, ll. 14-18, p. 11, ll. 20-25, p. 14, ll. 20-25.) After the hearing, due to the inaction and default by the buyer, Judge Fitzgerald appointed James A. Prostko as the Chapter 11 Trustee. Respondent Prostko, was appointed as Chapter 11 Trustee on June 21, 1988. By order dated June 28, 1988, the case was converted to a proceeding under Chapter 7 and Respondent Prostko, was retained as the Chapter 7 Trustee. The trustee made demand upon the defendants to proceed with the sale. The defendants did not comply. Once the business was closed, the trustee was unable to find a buyer for the entire club. The trustee then liquidated the assets of the Debtor through two separate sales. Counsel for MRGB, Inc. and Morris Rand was given notice of both sales, however, no objections were filed by these parties.

While in the process of liquidating the estate, the trustee brought an adversary proceeding against MRGB, Inc. and Morris M. Rand for failure to complete the sale.

It must be pointed out that Mr. Rand's petition at pages 30-31 *incorrectly* states that James Prostko participated in the negotiations and hearings that led to the approval of the order of sale by Judge Fitzgerald. It is clear from the record that Respondent Prostko was not appointed as the Chapter 11 Trustee until June 21, 1988, three weeks after the order was entered confirming the sale of the Debtor's assets. The case was then converted to a Chapter 7 one week later. Mr. Prostko *did not*, in any manner, participate in the events leading up to the sale as alleged in the petition.

REASONS FOR DENYING THE WRIT

I.

THE INSTANT CASE PRESENTS NO ISSUE OF FEDERAL LAW SO SPECIAL AND IMPORTANT AS TO WARRANT REVIEW VIA WRIT OF CERTIORARI.

Contrary to Mr. Rand's argument, this case did not involve the misapplication of the doctrine of judicial estoppel. Instead, the trial judge, from review of the court's records of previous hearings and the evidence presented at the trial, made factual findings which clearly support the personal liability of Morris Rand in this transaction. Judge Markovitz found that:

> As a result of Rand's attorney's representations, creditors withdrew their objections to the sale to MRGB, Inc. and participated in drafting the Order which the Court signed on May 31, 1988. More importantly, the Court ultimately relied on these representations by Defendant, Morris M. Rand's attorney in confirming the sale to MRGB instead of insisting that Rand fulfill his obligation pursuant to the April 19, 1988 agreement. Absent these representations, the

> sale to MRGB, Inc. would not have been confirmed.

(Opinion of Judge Markovitz dated May 16, 1990, Petitioner's Appendix 45a).

Judge Markovitz correctly applied the doctrine of judicial estoppel to the unique facts presented and all appellate courts below, upon review of the briefs and record have agreed. There is no confusion regarding the doctrine or its purpose.

This case does not involve the interpretation of an unclear provision of the Bankruptcy Code nor does it involve an area of federal law marred with inconsistency. Accordingly, the petition of Morris Rand is without merit.

II.

THE BANKRUPTCY COURT AND APPELLATE COURTS BELOW CONSIDERED PETITIONER'S ARGUMENTS AND CORRECTLY APPLIED THE DOCTRINE OF JUDICIAL ESTOPPEL TO THE FACTS PRESENTED.

In his memorandum opinion of May 16, 1990, Judge Markovitz succinctly sets forth the doctrine of judicial estoppel and its applicability to the facts of this case (Petitioner's Appendix 40a). Based upon the record and the testimony, Judge Markovitz found Morris Rand's position before the sale inconsistent with his position after the sale. Petitioner Rand now argues that his position was consistent. The trustee asserts that Mr. Rand disputes the judge's factual determination, not the applicability of the doctrine of judicial estoppel.

A summary of the evidence produced at trial supports the

Bankruptcy Judge's conclusion and highlights Mr. Rand's inconsistency. The testimony of Thomas Jayson, the owner of the Debtor corporation, and Ronald Conway, its co-counsel, establishes that after Mr. Rand's representatives viewed the Debtor's business in March of 1988, Mr. Rand expressed interest in purchasing the club and Mr. Jason and Mr. Conway traveled to Florida to meet with Mr. Rand and his counsel, Robert Wunker. Conway and Jayson were advised by Rand and Wunker that Rand would be the interested party and would be providing the funds for the purchase. Mr. Rand also represented that he was wealthy and would not be borrowing the funds necessary for the purchase. The negotiations continued and resulted in the agreement of sale dated April 19, 1988 between "Morris M. Rand and/or his assignee" and the Debtor (Appendix 90). The agreement was signed by Mr. Rand individually and contained provisions requiring the business to remain open up to the date of closing and required the seller to discontinue efforts to market the business.

The letter from Robert Wunker to Ronald Conway of April 7, 1988 attached to the motion for sale (Appendix 113) provides background information on Morris Rand and states that Morris Rand "will be providing the capital for this venture." "Presently, his financial statement shows an unleveraged net worth well in excess of $10,000,000.00." Based upon the representations of Morris Rand and Robert Wunker, the Debtor and its counsel discontinued negotiations with other interested parties. Also, in order to keep the business open and to continue to operate, Mr. Jayson and others provided additional money to the club. Administrative claims were later filed by these parties for reimbursement of moneys advanced to continue operations. Even with this assistance, it was necessary for Morris Rand to personally advance the May 1988 rent in early May in order to satisfy the landlord with regard to assumption of the lease.

Thomas Jayson, Ronald Conway and Michael Fives, co-counsel for the Debtor, testified that they believed that Morris Rand was the actual purchaser in this transaction and that he would be providing the funds to consummate the sale by funding MRGB, Inc. Michael Fives testified that based upon his conversations with Robert Wunker in May 1988 prior to the sale, he believed MRGB, Inc. had already been incorporated and funded by Morris Rand. (Transcript of trial, April 5, 1990, pp. 53-57, Appendix 840-844). Similarly, Ronald Conway testified that when Robert Wunker came to Pittsburgh for the hearing on the sale, he met Wunker at the airport and provided Wunker with accomodations in his home. Robert Wunker told Mr. Conway that the corporation was set up so that Morris Rand was in control and that Morris Rand had a net worth far in excess of the $10,000,000 set forth in the April 7th letter.

Robert Wunker was clearly the agent for and the representative of disclosed prinicipal, Morris Rand. At all hearings, Robert Wunker entered his appearance for Morris Rand only and referred to his client as Morris Rand, never MRGB, Inc. The misrepresentation by Robert Wunker that MRGB, Inc. was not a shell corporation was also made in open court. At the hearing on May 19, 1988, Mr. Wunker stated :

> MRGB, Inc. is not going to be a shell corporation and I challenge them to say otherwise. Where else is the money coming from for this purchase?
>
> The Court: Well, right now —
>
> Mr. Wunker: We are funding that money into MRGB and funding that then into the payoff.

See transcript of May 19, 1988 hearing, p. 27, ll. 11-16,

Appendix 276.)

> Mr. Wunker: He is putting up $1,000,000.00. It is hard cash. He says what better adequate assurance of his willingness to go forward can there be.

(*See* transcript of May 19, 1988 hearing, p. 36, ll. 6-8, Appendix 285.)

These statements were in response to the landlord's request for a personal guarantee of the lease and the court's question as to adequate assurance of performance.

The above statements when compared with the statements set forth in pages 10 and 11 of Mr. Rand's petition clearly show the inconsistency in Mr. Rand's current position. With regard to the issue of adequate assurance and assumption of the Debtor's lease for the premises, it is true that Mr. Rand steadfastly refused to sign a personal guarantee similar to that of the former owner, Mr. Jayson. Landlord's counsel, however, argued its necessity as adequate assurance of future performance. With regard to the agreement of sale, however, it was *always* Mr. Rand's position that he was providing the money for the purchase. Based upon these misrepresentations and the represented financial strength of Morris Rand, individually, the landlord and other creditors withdrew objection to the sale and negotiated the terms of the final order permitting the sale to MRGB, Inc. Based upon these misrepresentations, the Debtor permitted George Blacke to begin operating the club for the Debtor until the sale could be consummated. Based upon these misrepresentations, the court confirmed the sale to Morris Rand's assignee MRGB, Inc. and not Morris Rand.

In the face of the above evidence, Morris Rand, however, continues to argue his freedom from liability based upon the language of the order confirming the sale to MRGB, Inc. only. After considering the evidence, the Bankruptcy Judge correctly held that this "legal sleight of hand will not make this specious defense available . . . " (Opinion of the Bankruptcy Court at p. 17, Petitioner's Appendix 41a) The Bankruptcy Judge clearly has the power and duty to creditors to consider its own record and reasons for entering a particular order. The Bankruptcy Court's opinion reviews the case law in the Third Circuit addressing the use of judicial estoppel (*citing Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580 (W.D. Pa. 1987); *Lawrence v. United States of America I.C.C.*, 629 F. Supp. 819 (E.D. Pa. 1985); *National Union Electric Corp. v. Matsushita Electric Industrial*, 498 F. Supp. 991 (E.D. Pa. 1980); *Wade v. Woodings-Verona Tool Works, Inc.*, 469 F. Supp. 465 (W.D. Pa. 1979)) and also two opinions of the Sixth Circuit (*citing Edward v. Aetna Life Ins. Co.*, 690 F.2d 595 (6th Cir. 1982); *City of Kingsport v. Steel & Roof Structures, Inc.*, 500 F.2d 617 (6th Cir. 1974)). Judge Markovitz' opinion does not delve into nuances or side issues relating to judicial estoppel but deals with the doctrine in its basic form. The cases cited by the Bankruptcy Court exhibit no disharmony or "rampant confusion" as suggested by Mr. Rand.

It is clear from his opinion that Judge Markovitz understands the doctrine of judicial estoppel and applied it correctly to the unique facts in this case. The Bankruptcy Judge found Mr. Rand's conduct before the sale inconsistent with his position after the sale. Mr. Rand's entire argument is grounded upon a dispute with the factual findings of the Bankruptcy Judge, not a misapplication of the law of judicial estoppel. Upon consideration of Mr. Rand's appeals, the District Court and Circuit Court found no error. There is no reason for this court to review the proceedings below.

CONCLUSION

Based upon the foregoing, it is clear that the arguments of Morris M. Rand have no merit. The petition for writ of certiorari should be denied.

Respectfully submitted,

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